COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[CHAPTER VIII, RULE 32(2)(b)]

Description of the case.

(1) Criminal Appeal no. 210 of 2004

Pawan S/o Nandan Singh Mer
R/o Ritha P.O. Mukteshwar Patti
Satboong, at present R/o Tulsi Nagar
C/o Vijay Singh Haldwani,
District Nainital. … Appellant.

Vs.

State of Uttaranchal … Respondent.

(2) Criminal Appeal No. 215/2004

Aamir S/o Hamid Ali,
R/o Mohalla Sahukara ,
Town and P.S. Bilaspur,
District Rampur (U.P.) .. Appellant.

Vs.

State of Uttaranchal … Respondent.

(3) Criminal Appeal No. 216/2004

1. Babu S/o Aleem Ansari
   R/o Dadon P.S. Dadon
   District Aligarh (U.P.)
2. Arjun S/o Bala Singh
   R/o Kasba Mela Ghat Road
   P.S. Khatima,
   District Udham Singh Nagar … Appellants.

Vs.

State of Uttaranchal .. Respondent.

(4) Criminal Reference No.6 of 2004.

A.F.R. (Approved for reporting)
~~Not approved for reporting.~~

(Hon'ble Mr. Justice Irshad Hussain)

(Hon'ble Mr. Justice B.S. Verma)

Date 12-07-2005

In the High Court of Uttaranchal, at Nainital.

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R/o Ritha P.O. Mukteshwar Patti
Satboong, at present R/o Tulsi Nagar
C/o Vijay Singh Haldwani,
District Nainital. … Appellant.

Vs.

State of Uttaranchal … Respondent.

Sri Navneet Kaushik, Sri Kailash Joshi, learned counsel for the appellant.
Sri D.K.Sharma, learned G.A. assisted by Sri Amit Bhatt, learned A.G.A.

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Aamir S/o Hamid Ali,
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Vs.

State of Uttaranchal … Respondent.

Sri Sudhir Kumar, learned counsel for the appellant.
Sri D.K.Sharma, learned G.A. assisted by Sri Amit Bhatt, learned A.G.A.

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Vs.

State of Uttaranchal .. Respondent.

Sri S.P.S. Panwar, Senior Advocate,
assisted by Sri H.C. Pathak, learned counsel for the appellants.
Sri D.K. Sharma, learned G.A. assisted by Sri Amit Bhatt, learned A.G.A.

(4) Criminal Reference No. 6 of 2004

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.
Dated: 12-07-2005

(Per: Hon'ble Irshad Hussain, J.):

These three criminal appeals under Section 374 (2) of the Code of Criminal Procedure (for short 'Code') from convictions of the four accused and criminal reference under Section 366 of the

'Code' for confirmation of sentences of death of all of them arise out of the judgment dated 28-6-2004 passed by Sri G.K. Sharma, Additional Sessions Judge/Fast Track Court, Nainital in Sessions Trial No. 166/2003.

2- Brief facts of the case are as follows:-

Victim of the case Km. Sushma aged about six years was the daughter of informant Amar Sing Bisht (P.W.4) a migrant labourer from Nepal residing in the locality known as 'Rajmahal' Hotel Compound' Mallital, Nainital. She went missing since 8 A.M. on 25-9-2003 when she left her home to ease herself. Her search by the informant and others did not yield any result till night. According to the prosecution the informant along with his three acquaintants namely Veer Bahadur (P.W.2), Puran (P.W.3) and Mangal (P.W.5) residents of the same locality deiced to sit awake in that locality during the night with a hope that the girl may be found on her return or to be brought there by other in the night. At about 1.00 or 1.30 A.M. (in the night) four person were seen coming from the side of the road right up to the vacant plot of Sardar Ji in that locality. These four person were seen throwing the dead body of the girl from gunny bag in the said plot. When they were returning after doing the said job they were arrested by the informant and his companions by raising alarm. There arrested persons disclosed their names as Babu, Amir, Pawan and Arjun and all of them were stated to have made extra-judicial confession of their involvement in the commission of crime of rape, carnal intercourse, murder and causing disappearance of evidence by disposing of the dead body of the victim in the said plot. They were then taken to the police station P.S. Mallital, Nainital where the informant lodged the written report, Ext. Ka.3, on the basis of which check F.I.R., Ext. Ka.11 was drawn at 2 A.M. on 26.9.2003 to register a case under Sections 302, 201, 34 I.P.C. against these four accused, vide G.D. Report No. 2, Ext. Ka.12.

3- Investigation of the case was taken up by S.H.O. Sri Bachan Singh Rana (P.W.11) in whose presence the case was registered. After completing the initial formalities at the Police Station he left for the place where the dead body was thrown by the accused and

on reaching there inspected the site. Inquest was held on the dead body of Km. Sushma at 6.30 A.M. and inquest report, Ext. Ka.2 (also referred and proved by P.W.4) was then prepared. The dead body was packed and sealed in a packet and was dispatched for post mortem along with relevant documents including that of the inquest. The post mortem was conducted the same day, that is, 26.9.2003 at 1.05 P.M. by Dr. K.S. Dhami (P.W.1). From the police station accused were sent for medical examination. However injury report of accused Pawan was filed on record on the trial. Investigating Officer attached the relevant items from the site. The Investigating Officer on his return to the police station examined accused persons and on the disclosure statement of accused Babu and Aamir recovered a two feet long electric wire of yellow colour from the room of the house of Ramesh Moonga situate near the Sanwal School and where accused were then residing, vide memo, Ext.Ka.6-A. The wire was stated to be used by the accused to strangulate the victim by neck to commit her murder. The under wear of the accused were attached on 27-9-20063 while they were in District Jail, Nainital, vide memo, Ext. Ka.6 and these were sent for chemical examination. The accused volunteered to have their confession recorded by finally only accused Ameer agreed to it and accordingly his statement under Section 164 of the 'Code' Ext. Ka.7, was recorded on 7-10-2003 by Sri Mahendra Kumar Joshi (P.W.8), Special Judicial Magistrate, who was also then incharge Chief Judicial Magistrate, Nainital. As per the report of the Chemical Examiner of the Government Lab, Agra, Ext. Ka.22 human semen and spermatozoa were detected all the four under wears of these accused and also on the Paijama of the victim. Human blood was found and the clothes of the victim only. On completion of the usual formalities of the investigation, charge sheet, Ext. Ka. 21 was submitted against these accused on 1.11.2003. Accused on being committed to the court of Sessions faced the trial.

4- Prosecution in order to bring home guilt to the accused relied upon the evidence of eleven witnesses. P.W.1, Dr. K.S. Dhami held autopsy on the dead body of Km. Sushma at 1.05 P.M. on

26-9-2003 and prepared the autopsy report, Ext. Ka.1. He observed following abnormal features in the dead body and ante-mortem injury:-

Labia-majora were separated. Hymen ruptured. Reddish secretion was present inside the vagina.

Rectum-had laceration and abrasion around the external region.

On separation of gluteal fold large rectal canal was visible, which was dilated. The spinsters were damaged and there was blood in the anal canal. Mucosa was also damaged.

(Rectal and vaginal smear were taken for test).

There was well defined ligature mark on the upper part of neck slightly depressed and encircling the neck horizontally and completely. Colour was reddish and margins were ecchymosed.

On dissection of ligature mark there was extravession of blood in to the sub cutaneous tissue under the ligature mark as well as adjacent structures.

Cyanosis present over the face, lips and ears.

5- On internal examination larynx and trachea was found congested and there was bloody forth present. Lungs were congested. Right chamber of heart was full of blood whereas left chamber was empty. In the opinion of the Medical Officer death occurred about half to one day ago due to asphyxia as a result of strangulation. He also opined that the rape and unnatural intercourse with the victim and thereafter, her death was caused some time between 8 A.M. to night hours of 25/26.9.2003.

6- P.W.2, Veer Bahadur; P.W.3 Puran; P.W.4 informant Amar Singh and P.W.5 Mangal are the witnesses of the fact that the appellants were seen throwing the dead body of the victim where-after these appellants were arrested and were brought to the police station. The appellants are stated to have confessed their guilt before these witnesses of the fact as soon as they were arrested near the place where the dead body was thrown, P.W.6, Girija Shankar Yadav is Deputy Jailor, District Jail, Nainital and he gave evidence regard attachment of under-wears of the four accused while they were in the jail on 27-9-2003 vide memo, Ext. Ka.6.

P.W.7, Vishnu is one of the Panch witness of the inquest and also of recovery of electric wire on the disclosure statements of accused Babu and Aamir. P.W.8, Sri Mahendra Kumar Joshi was posed Special Judicial Magistrate, Nainital on 7.10.2003 and on that day he recorded the confessional statement under Section 164 of the 'Code' of accused Aamir. P.W.9, Constable Mohammad Lal and P.W.10, constable Brijpal Sharma formally proved the relevant G.D. entries pertaining to the registration of the case and also the report, Ext. Ka.10 and check F.I.R. of the case, Ext. Ka.3 P.W.11, Inspector Bachan Singh Rana is the Investigating Officer of the case and he proved relevant documents prepared in the course of the investigation of the crime.

7- Accused pleaded not guilty and contended that they have been falsely implicated in the case by the police. They urged that they were picked-up by the police and were not arrested by the witnesses from near the place of the alleged recovery of the dead body of the victim and that their under-wears were not attached by the police. No evidence in defence was adduced.

8- As is evidence, the case of the prosecution rests on circumstantial evidence. The learned Sessions Judge on the basis of his appreciation of the evidence on record came to the conclusion that complete chain of circumstances establish beyond reasonable doubt that all the four accused and none else committed rape, carnal intercourse on the victim Km. Sushma and thereafter in pursuance of their common intention committed her murder and to screen themselves from legal punishment disposed of the dead body at the plot from where they were arrested and they were accordingly held guilty, convicted and awarded death sentence under Section 302/34 I.P.C.; life imprisonment under Section 376 I.P.C. life imprisonment and fine of Rs. 1000/- each under Section 377 I.P.C. and in default of payment of fine to suffer further imprisonment of six months and seven years R.I. and fine of Rs. 2000/- each under Section 201.34 I.P.C. and in default of payment of fine to suffer further imprisonment of six months R.I. per judgment dated 28-6-2004, which is under challenged in these appeals.

9- According to the learned Addl. Sessions Judge, following seventeen incriminating circumstances were satisfactorily established by the evidence of the prosecution:-

(1) Km. Sushma deceased, the daughter of informant Amar Singh (P.W.4) left her house to ease herself at about 8 A.M. on 25-9-2003.

(2) Km. Sushma thereafter did not return to her house and whole day's search for her whereabouts did not prove fruitful.

(3) The same day missing report, Ext. Ka.10 was lodged at the police station some time in the evening between 4 P.M. to 8 P.M.

(4) In the night between 25/26-9-2003 when the informant and others were out side their residential premises with a hope that Km. Sushma may return or she may be brought there by some-one, these accused were at about 1.30 in the night, seen coming towards the vacant plot of Sardar Ji with a gunny bag where they threw the dead body of Km. Sushma

(5) The four witnesses namely, Veer Bahadur, Puran, Amar Singh and Mangal then raised alarm and apprehended all the four accused at that spot.

(6) That these accused on being arrested made extra-judicial confession of their guilt before the witnesses.

(7) The arrested accused were then taken to the police station and F.I.R. was lodged.

(8) A piece of wife said to have been used to strangulate the victim by neck was recovered on the disclosure statements and at the instance of accused Aamir and Babu.

(9) The under-wears of the accused was attached on being removed from their person in the jail and chemical examination report affirmed that these were found stained with human semen and spermatozoa.

(10) One of the accused Aamir confessed his guilt before a Judicial Magistrate.

(11) The medical evidence support the prosecution case that before murder Km. Sushma was subjected to rape and carnal intercourse.

(12) The medical evidence further indicate that the offences of rape, carnal intercourse and murder in all probability were committed by more than one culprits.

(13) Witnesses of the fact Veer Bahadur, Puran, Amar Singh and Mangal were not having any grudge and enmity against the accused and further that these witnesses were not maintaining any special relations with the police and it was highly improbable that they could have falsely implicated the accused in the case.

(14) The accused failed to give any explanation as to how the dead body of Km. Sushma came in to their possession and the circumstance that they were found disposing of the dead body make out a strong incriminating circumstance of their involvement and participation in the commission of the crimes.

(15) The fact that the victim was subjected to rape and carnal intercourse itself indicate the mental bent up of mind of the accused and further the motive to commit her murder and then attempt to dispose of her dead body surreptitiously to screen themselves from legal punishment.

(16) Confirmation of presence of semen and spermatozoa on the under wears of these accused.

(17) Taking of vaginal and anal/rectal smear of the victim and the confirmation of human blood, human semen and spermatozoa in it by the expert.

10- Learned Senior Advocate, Sri S.P.S. Panwar, and other learned counsel for the accused argued at length and not only assailed the inferences drawn by the learned Additional Sessions Judge in regard to the above mentioned incriminating circumstances but also submitted that the entire trail stand vitiated on account of the accused having been denied the opportunity to exercise their statutory right to be defended by a pleader as is the

mandate of the Constitution of India and as envisaged by Section 303 as well as Section 304 of the 'Code' and also by reason of the fact that the counsel appointed under Section 304 of the 'Code' to defend the two accused was not given fair opportunity to prepare and conduct the case effectively on their behalf. Learned Senior Advocate also argued that a competent lawyer was not appointed by the learned Additional Sessions Judge to defence the accused despite the fact that the offence with which the accused were charged was punishable with capital punishment and the learned Additional Sessions Judge thus failed to gauge the importance and gravity of the case in legal and proper perspective while providing the lawyer at the expense of the State. On the other hand learned G.A. persuasively submitted that no prejudice whatsoever was caused to the accused by reason of an aberration in compliance of the legal provisions and further that the evidence of the prosecution was analyzed in a proper legal background to see as to whether or not the incriminating circumstances which emerged in the case stand proved satisfactorily. According to him the findings of guilt was recorded on legal and admissible evidence and on the basis of complete chain of incriminating circumstances formed to establish beyond reasonable doubt the involvement of the accused in the commission of the crimes and that the murder having been committed in a ghastly and gruesome manner, the capital punishment was rightly awarded in the case.

11- In regard to the submission that the trial stand vitiated for want of compliance of the constitutional mandate as well as the legal provisions it need to be stated that the accused were committed to the court of Sessions on 20-12-2003 by the C.J.M., Nainital and when the accused were brought before the court of Sessions in pursuance of the commitment if the case date for framing of the charge was fixed by the Sessions Judge, Nainital. The date fixed for the purpose was 2.3.2004. Before this date the sessions trial was transferred to the court of Additional Sessions Judge/ I F.T.C., Nainital for disposal according to law and on receipt of the record this transferee court fixed 16-3-2004 for framing of the charge. This Additional Sessions Judge took up the

case for this purpose on 16-3-2004 and in the presence of all the four accused framed charges against them for the offences as mentioned above and for the commission of which the accused were later on convicted. The order sheet of the said date does not reflect the presence of the defence lawyer or even the public prosecutor before the learned Additional Sessions Judge and perhaps the charges were framed after perusal of the documents of the prosecution without referring that the Judge was of the opinion that there were grounds for presuming that the accused have committed offences which are exclusively triable by the court as envisaged by Section 228 of the 'Code'. Record also reveal that till that date neither the accused have engaged their own lawyer nor they were provided with a defence lawyer at the expense of the stated as provided under Sections 303 and 304 of the 'Code'. The learned Additional Sessions Judge however after framing the charges and making an endorsement that the accused pleaded not guilty and claimed to be dried. Fixed 24-3-2004 for recording of the evidence of the prosecution and directed the prosecution witnesses to be summoned. On 24-3-2004 A.D.G.C. (Criminal) moved an application for adjournment of the trial in view of the prosecution witnesses having not been served with summons and on his prayer the trial was adjourned to 7.4.2004 for recording of the evidence of the prosecution. However no lawyer was appointed on this date also as Amicus Curiae for the accused. On 7.4.2004, as is evident from the record and the order sheet of the said date, three prosecution witnesses, P.W.1, P.W.2, and P.W.3 were examined by the prosecution, and on the same day Sri M.A. Khan, Advocate was appointed Amicus Curiae. The Amicus Curiae cross examined all these three witnesses on behalf of two accused Babu and Aamir only which indicate that only these two accused were provided the Amicus Curiae by the learned Additional Sessions Judge. The witnesses were cross-examined by a lawyer on behalf of other two accused Pawan and Arjun which indicate that they have engaged the lawyer of their choice after the charges against them have already been framed in the trial.

12- There can be no doubt that although the charge were framed against the accused on 16-3-2004 without the accused being represented by their counsel and without recording of the satisfaction of the Judge that there are grounds for presuming that the accused have committed the offences with which they were being charged as envisaged by Section 228 of the 'Code', but we are of the considered view that there was enough evidence and material available on record at that time to form an opinion that there was sufficient ground for proceeding against the accused. The reason being that at the stage of framing of the charge the Judge is not required to enter in to detailed scrutiny and consideration of the material and evidence which is available in the form of the record of the investigation or the documents submitted with the charge sheet and therefore as the allegations stated against the accused supported by the collected evidence even the above infraction in the compliance of the legal provision do not indicate any prejudice having been caused to the accused and in a situation like this the above aspect would not entail vitiate of the entire trial against the accused.

13- Amicus Curiae to the two accused in the case was provided on the day, that is, 7.4.2004 when three prosecution witnesses were examined in the trial. Sri M.A. Khan, Advocate was appointed Amicus Curiae for the two accused and he proceeded to cross-examine all the three witnesses on that date itself. Learned Senior Counsel Sri Panwar submitted that a duty is case of Sessions Judge to see that raw and inexperienced juniors are not appointed to defend an accused in capital punishment cases and in support of the argument learned counsel pressed in to service the reported decisions Panchu Gopal Das vs. State; A.I.R. 1968 Cal. 38, and Mohd, Kunnumal vs. State of Kerala; A.I.R. 1963 Ker. 54. The argument was advanced on the assumption that the Amicus Curiae appointed by the learned Additional Sessions Judge was an inexperienced Advocate. But we find nothing on record to sustain the submission made in that behalf. It appear that Sri. M.A. Khan, Advocate was practicing in criminal side in the Sessions Court at Nainaital and judicial notice can be taken of the fact that he is at

present a Brief Holder of the State of Uttaranchal in the High Court and is conducting criminal appeals in the High Court. This indicate that Sri Khan has long standing as a criminal lawyer and was rightly appointed as Amicus Curiae to defend the accused in capital punishment case. Further he was assigned the case to defend the two accused at the expense of the state on the day when the three prosecution witnesses were examined but the learned Amicus Curiae had not sought adjournment to avail some time to prepare the case. This indicate that the learned Amicus Curiae has not felt handicapped and must have prepared the case to his satisfaction so as to proceed with the cross examination of the witnesses on that very day and looking at the cross-examination of the witnesses we do not find that for this reason any prejudice was accused to the two accused for whom he was appointed Amicus Curiae. Therefore neither the ratio of the reported decisions cited at the bar is applicable to the facts of the case nor the argument that in the face of the facts of the case retrial, after setting aside the judgment under appeal appear justified, can not legally be sustained.

14- Coming to the facts and the incriminating circumstances of the case learned counsel of the appellants argued that even if such facts as Km. Sushma deceased went missing at 8 A.M. on 25-9-2003; she did not return to her house the whole day and despite search her whereabouts were not known; the missing report was lodged that very day; the victim was subjected to rape and carnal intercourse in the night between 25/26-9-2003 and thereafter she was strangulated to death, are satisfactorily established and proved, the other relevant facts such as the accused were seen coming towards the vacant plot of Sardar Ji with a gunny bag at about 1.30 in the night of 25/26-9-2003 and were seen throwing the dead body of Km. Sushma; they were then arrested at the spot; that they on their arrest confessed their guilt before the witnesses; that they were taken to the police station soon after the arrest and the under-garments of the accused were found stained with human semen and spermatozoa and that of the victim Km. Sushma also, were not proved for want of reliable and credible evidence and consequently the emerged circumstances do not form a complete

chain pointing to the guilt of the accused. It is well settled that an inference of guilt in a case based on circumstantial evidence can be drawn only if the proved facts are wholly inconsistent with their innocent. The evidence of the prosecution is, therefore, required to be re-appraised and re-assessed keeping in view the settled legal principles in the light of the submission made at the bar and in the light of the admitted facts and inferences to be drawn from the proved facts.

15- As referred above with reference to the argument at the bar the evidence of informant Amar Singh Bisht (P.W.4), the father of the victim and other three witnesses of the facts, namely, Veer Bahadur (P.W.2), Puran (P.W.3) and Mangal (P.W.5) and also the evidence of Medical Officer Dr. K.S. Dhami (P.W.1) establish beyond doubt the circumstances that Km. Sushma went missing since 8 A.M. on 25.9.2003; she did not return to her house and remained untraceable the whole day; missing report, Ext. Ka.10 was delivered at the police station in the evening and she was raped and subjected to carnal intercourse and thereafter strangulated to death some time between 8 P.M. to the mid night of 25/26-9-2003. The cross-examination of these witnesses reveal that the defence has no where seriously disputed these facts which stand established beyond reasonable doubt by the evidence of the prosecution and it will be relevant to state that these facts pertain to the incriminating circumstances referred at serial Nos. 1,2,3, 11 and 17 as enumerated by the learned Additional Sessions Judge and referred in the earlier part of the judgment. According to the learned counsel for the appellants the other incriminating circumstances pertain to disputed facts and which they claimed to have not been satisfactorily proved by the evidence of the prosecution and it is to be seen whether the claim is sustainable or not.

16- All the four witnesses of the fact in this case are migrant labourers from Nepal and they claimed to be the residents of hutments in the compound of Rajmahal Hotel at a distance of about 1 ½ furlong from police station Mallital, Nainital. It is in the evidence that they out of their foresight decided to sit awake in the

vicinity of their hutments during the night succeeding the day of missing of the victim Km. Sushma with a hope that the girl may herself return to her house or she somehow may be brought there by others and that their providence came to be justified when in the mid night (night intervening 25/26-9-2003) four persons were seen coming from the side of the road and on reaching at the nearby vacant plot of Sardar Ji were seen disposing of a gunny bag from which the dead body of a girl when off in the open. Seeing this witnesses got alarmed and when these four persons were going back they were arrested by the witnesses. Those four arrested persons then disclosed their names and admitted their guilt as regards the crime committed in relation to the victim of the case.

17- According to the evidence the witnesses Mangal and Amar Singh took up their position, to sit awake, on the western side whereas Veer Bahadru and Puran sat towards south in wait for the return or otherwise of the girl Km. Sushma. Learned counsel for the appellants by drawing attention to the version of the F.I.R., Ext. Ka.3 submitted that the prosecution later on made a deviation and an improvement by showing presence of four witnesses occupying two separate vintage positions as compared to the only two witnesses namely Amar Singh Bisht and Mangal mentioned in the F.I.R. who decided to sit awake for the return of the girl during the night and thus urged that the entire claim itself appear highly unnatural, impractical and not capable of being conceived even by man of very ordinary prudence such as the witnesses of fact who are labourers by their profession.

18- No doubt there is variation in the version of the F.I.R. and the evidence of above four witnesses to the extent as referred but this can not be said to be such a material infirmity as may entail rejection of the evidence of all the witnesses or at any rate the evidence of Veer Bahadur and Puran not named in the F.I.R., Ext. Ka.3. It is well settled and as also reiterated by the Apex Court in the matter of Bhagwan Singh and others versus State of M.P.; 2002 A.I.R. S.C.W. 1532 that mere not –mentioning of the name of the witness in the F.I.R. is not relevant factor when such a witness is a natural witness of the occurrence and his evidence is held to be

reliable. It was also stressed and there is no requirement of law for mentioning the names of all the witnesses in the F.I.R., the object of which is only to set the criminal law in motion. Considering this aspect the evidence of the two witnesses not named in the F.I.R. can only be discarded if they are not found natural witnesses of the occurrence and their evidence does not appear trustworthy. In other words the evidence of all the four witnesses of the fact need to be placed on the same footing and the only requirement is to scrutinize the evidence with case and caution as they admit to be related to each other and residing in the same locality known as compound of Hotal Rajmahal.

19- Before taking up the detailed scrutiny of the evidence of the witnesses it may however be stated at the out set that it was neither unnatural nor impractical for these rustic witnesses who are labourers by profession in taking decision to sit awake during the night in the locality of their residential hutments with a hope that the girl Km. Sushma may return herself or some one may bring her there in that locality of her house. The decision taken by these witnesses to act in this manner can not be said to be unusual and not capable of being conceived in the peculiar circumstance of the case when the minor girl went missing since morning. Therefore, we see nor merit in the argument of the learned counsel for the accused that the evidence of the prosecution need to be discarded out rightly on the basis of the such conduct of the witnesses.

20- In the site-pan, Ext. Ka.13 Hotel Rajmahal and its compound have not been shown. Learned counsel for the accused submitted that when this compound and the hotel have not been shown to be near the place where the witnesses allegedly sat in the night, it was not probable for them to have seen the four accused coming there up to the plot of Sardar Ji to dump the dead body of the girl in a gunny bag and therefore the spot position itself create grave doubt in the evidence of the witnesses. It was also argued that the house where the four accused were residing or from where they came out during the night with gunny bag has not been shown in the site-plan and therefore it could not be safely accepted that the four accused came from their residential quarters right up to the vacant plot of

Sardar Ji with gunny bag with they abandoned there and on seeing the dead body of the girl they were arrested near that plot by the witnesses. No doubt neither the building of the Rajmahal Hotel nor its compound as such have been shown and referred in the site-plan but the evidence of the witnesses clearly indicate that Hotel Rajmahal is situate in that vicinity and near the Hotel Sital Kiran shown in the site-plan and situate in the west of the place where the witnesses sat during the night and arrested the four accused. We may in this regard refer the evidence of Veer Bahadur (P.W.2) who specifically gave out that Hotel Sita Kiran is situate near Hotel Rajmahal and at a distance of about 4-6 paces from the drain at that spot. The drain has also been shown in the east of Hotel Sita Kiran in the site-plan. In that locality Sanwal school is also situate which has also been shown in the site-plan. This is the reason that this witness also gave out that Sanwal school is also situate in the east of the Hotel. The other witness informant Amar Singh (P.W.4) was also cross-examined with regard to the spot position and this witness also affirmed the presence of Sanwal school situate at a short distance from his hutment. It is also the consistent claim of the witnesses that they reside in the hutments in the compound of the Rajmahal Hotel which is so popularly known by reason of the existence of this Hotel Rajmahal there and in a situation like this the Investigating Officer was not required to show each and every building by its name or its compound in the site-plan, Ext. Ka.13.

21- This aspect of the matter may also be considered with another angle. According to the prosecution a wire was recovered at the instance of the accused Aamir and Babu from the house of Ramesh Monga where the four accused used to reside although they were working separately as labourers. The house of Ramesh Monga has also been shown in the site plan as situate in the west of the place marked by letter ‘C’ where existed a tin shed of labourers and at with place the witnesses were shown to be sitting during the night of 25/26-9-2003 in wait for the return of the missing girl. Investigating Officer S.I. Bachan Singh Rana (P.W.11) was cross-examined at length but in regard to the topography of the spot and the houses shown in the site plan including the house of Ramesh

Monga where the accused used to reside, no material infirmity has been brought on record and therefore we see no merit in the argument of the learned counsel for the accused that the topography as stated to by the witnesses and as depicted in the site-plan, Ext. Ka.13 create doubt in the claim of the witnesses that they were sitting on a vintage point 'C' in that night in between the house of Ramesh Monga and the vacant plot of Sardar Jo and near that place and accused were arrested when they were returning after dumping the dead body of Km. Sushma in the vacant plot of Sardar Ji.

22- In F.I.R., Ext. Ka.3 source of light has not been mentioned and so is the case with the site-plan, Ext. Ka.3. Learned counsel for the accused argued that when there was no light the witnesses could not have seen the four accused disposing of the gunny bag in the vacant plot of Sardar Ji from which the dead body of small girl of six years of age went off in the open and by reason of which the accused got to be arrested at the spot by the witnesses. It is of significance that the Investigating Officer (P.W.11) has affirmed in his evidence that there was light at the gate of Sanwal school and also near the hutment of the informant of the case and his evidence stand corroborated by the evidence of the witnesses Puran (P.W.3) as well as Mangal (P.W.5). None of the witnesses were cross-examined to suggest and show that there was no light in that night in and around the locality where the occurrence took place and therefore in the totality of the circumstances of the case and evidence on record the omission of the source of the light in the F.I.R. and in the site plan would not tell upon adversely on the credibility of the evidence of these witnessed. We can also safely say that the Additional Sessions Judge has also properly considered this aspect of the matter while making appreciation of the evidence of the witnesses and reached to a correct conclusion that there was source of light which facilitated the witnesses to see all they stated and also to arrest the accused at that spot.

23- Learned counsel for the accused then referred to the contradictions in the evidence of the four witnesses to bring home their point of view that material infirmities in the evidence belie their claim and that the learned Additional Sessions Judge was not

justified in placing reliance on their evidence. For instance P.W.2, Veer Bahadur gave out that first of all the four accused in the night of the occurrence came out of the house in which they were residing and at that time they were seen carrying an empty gunny bag. The accused were, thereafter, seen going inside the room where the dead body of the girl was being kept. The dead body was then put in to the bag and then the accused Aamir gave that gunny bag with dead body inside it to accused Babu from a window of the room. After that the gunny bag was being carried by accused Babu and Aamir accompanied by the other two accused Pawan and Arjun and the gunny bag was thrown in the vacant plot of Sardar Ji and in that process the gunny bag got struck in the barbed wire of the fencing of the plot resulting which dead body of the girl got off in the open from the gunny bag. The version given by the other three witnesses namely Puran, Amar Singh and Mangal is contrary to it in the sense that according to them the four accused were seen coming with the gunny bag from the side where they used to reside and on reaching at the plot of Sardar Ji the gunny Bag was thrown in the plot and in the process the dead body of the girl went out to be seen by the witnesses where-after the four accused were arrested at the spot. No doubt the evidence of P.W.2 is at variance from the evidence of the other witnesses but we can not lose the sight of the fact that the evidence of this witness also is basically the same in pith and substance that the four accused were seen coming there with a gunny bag and when they threw the gunny bag in the plot the dead body of the girl came out and they were thereafter arrested at the spot. Therefore the infirmity in the statement of the witness can not be said to be as material as may warrant discarding the evidence of not only this witness but the evidence of other witnesses also. It appear that the witness P.W.2 went out to give the above detailed description and the manner in Which the accused were making preparation to come out with the gunny bag to dispose of the dead body as a result of a psychological defence mechanism to show that a truthful and honest account of the occurrence was being given in evidence in the court. At any rate this is not an unusual feature which is commonly seen in the

evidence in criminal cases and which at any rate do not go to the root of the matter and shake the basic version of the witness. In our view the evidence of P.W.2 is also trustworthy and the learned Sessions Judge also rightly rejected the contention of the defence that the evidence of the witness was unreliable.

24- The girl Km. Sushma was aged about six years and at the most her body weight may be around thirty kg and she at the most must have attained a height of about three feet. Referring to the profile of the victim, learned counsel for the accused submitted that it was highly improbable that as many as four accused were to come out together carrying the gunny bag containing the dead body of such a small girl to dispose it off in the vacant plot and that in a situation like this the evidence of all the four witnesses of the fact can hardly be said to be convincing and reliable. There can not be any hard and fast rule as to how the perpetrators of the crime would act in a given situation and if all the four accused went out together carrying the gunny bag to abandon it in the open it can not be taken to be an unusual and unnatural conduct of the accused so as to have the effect of discarding the otherwise reliable evidence of the witnesses who saw these accused doing the said job. In fact in the evidence of the four witnesses of the fact we fail to find any material infirmity as may force us to believe that they are not truthful witnesses. Therefore we feel it safe to mention that the evidence of these four witnesses fully corroborate the prosecution version that in the night 25/26-9-2003 they sat near the open plot of Sardar Ji and when these accused came there with gunny bag and threw it in the vacant plot of Sardar Ji the dead body of the girl Km. Sushma got off from it and thereafter all the four accused were arrested on the spot and were then taken to the police station where the F.I.R. was lodged by informant Amar Singh. There is absolutely nothing to indicate that these witnesses were inimical towards these accused and the question of falsely implicating them by saying their arrest in the manner is ruled out. The evidence of the prosecution thus establish the incriminating circumstances referred above at serial Nos. 4, 5, 7 and 13 and we subscribe to the similar

view as taken by the learned Additional Sessions Judge in that regard.

25- It is also the case of the prosecution that soon after the accused were arrest in the above manner they confessed their guilt before the witnesses after giving out their names to them. No doubt the claim that names were disclosed by the arrest accused could be said to be a natural consequence but we fail to subscribe to the prosecution version that all these accused jointly made extra-judicial confession of their guilt before the witnesses. That appear to be a highly unnatural conduct on the part of the accused who could not have been expected to make an extra-judicial confession jointly in regard to the manner as to how the crimes in relation to the victim were committed. This apart, the accused denied making such confession of their guilt in that manner before the witnesses but it is also of importance that the claim does not receive corroboration from the version of the F.I.R. of the case. It is the case of the prosecution that soon after the arrest the four accused were brought to the Police Station, Mallital where written F.I.R., Ext. Ka.3 was filed and the four accused arrested on the spot were handed over to the police. In the F.I.R. there is absolutely no mention of any extra-judicial confession said to have been made by the four accused. If they have made an extra-judicial confession this fact, in all probability, had to be mentioned in the written F.I.R. and there being no corroboration from the version of the F.I.R. we do not find it safe to believe the claim of the prosecution witnesses in regard to the joint extra-judicial confession of the accused.

26- This aspect of the matter also need to be considered in another angle. Veer Bahadur (P.W.2) gave out that after the arrest the accused Aamir urged that the crime was committed by accused Babu whereas the accused Babu was blaming accused Aamir for the commission of the crime. By no reasoning this could be said to be an extra-judicial confession of the accused. Witness Puran (P.W.3) did not disclose as to what was said by each of the four accused after the arrest and so is the case with other two witnesses Amar Singh and Mangal. The alleged generalized extra-judicial

confession without any specific admission by individual accused thus can not be taken to have any evidentiary value and therefore we have no hesitation in accepting the argument of the learned counsel for the accused that the learned Additional Sessions Judge fell in error in placing reliance on this aspect of the matter and coming to the conclusion that the extra-judicial confession of the guilt was made by the accused before the witnesses and this establish another incriminating circumstance in the link of the chain of the circumstances against the accused. In other words the incriminating circumstance at serial No.6 above was not established in this case.

27- Incriminating circumstance mentioned at serial No.8 above pertain to alleged recovery of electric wire on the disclosure statements of accused Aamir and Babu and the claim that the wire so recovered was sued to strangulate the victim by neck. We are forced to reject the prosecution evidence in this regard because the evidence of the Investigating Officer Bachan Singh Rana (P.W.11) failed to prove as the what statements precisely were given separately by these two accused to facilitate the discovery of the wire. The recovery of the wire on their joint statement therefore does not appear convincing. More so when in Ext. Ka. 6-A, the memo of alleged recovery of the wire the space where the time of recovery was to be mentioned remained blank indicating that it was not prepared at the spot and in fact no such recovery was made at the instance of these two accused. Further the length of the wire mentioned in the memo is only two feet whereas the wire, Material Ext. 3, was found to measure about two meters when its bundle was opened in the court at the time of the recording of the statement of the witness of recovery Vishnu (P.W.6). This also indicate that the evidence was fabricated and therefore no reliance on the claim of the prosecution in that regard should have been placed by the Additional Sessions Judg. In other words the incriminating circumstance in regard to recovery of wire under Section 27 of the Evidence Act, has not been proved by the evidence in the case.

28- In regard to the circumstances at serial Nos. 9, 12, 15 and 16, learned counsel for the accused submitted that the learned

Additional Sessions Judge should not have placed reliance on the evidence of the prosecution that presence of human semen and spermatozoa on the under-wears of the accused connect them with the crimes perpetrated on the victim of the case. The under-wears of the four accused were attached, as proved by Deputy Jailor Girija Shankar Yadav (P.W.5), on 27-9-2003 vide memo of attachment, Ext. Ka.6 while these four accused were in the jail. Learned counsel argued that if the accused were arrested by the witnesses and were taken to the police station at about 2 A.M. (in the night) on 26-9-2003, it was highly unusual that their under-wears were not attached on that very day and instead these were designedly attached later on to create false evidence against the accused. According to the learned counsel the accused persons are poor labourers and if they were wearing these under-wears since long the presence of semen stains and even spermatozoa is very much natural and in the absence of blood stains on their under-wears, not much importance was required to be attached to the report of the chemical examiner suggesting that the under-wears of the accused were stained with human semen and spermatozoa. We do not find the argument convincing because it is difficult to believe that all the four accused would have had nocturnal discharge as a result of which their under-wears got stained with semen which was confirmed on chemical examination of their under-garments attached on 27-9-2003. The medical evidence in the case no doubt reveal that the minor girl was subjected to rape and carnal intercourse and there had been bleeding as a result of rupture of the hymen and this was the reason that reddish secretion was noticed inside the vagina by the medical officer. While the victim was made to suffer such ignominy this may not be unusual that the blood was wiped off from the private parts before putting on the under-wears which however got stained with semen by reason of discharge which to some extent also usually occur even after coitus. This appear to be the reason that only the human semen and spermatozoa were detected on the under-wears of the four accused, per expert’s report, Ext. Ka.22 and also on the under-garments of the victim. In the peculiar circumstances of the case

absence of blood stains and also any stains of excreta on the under-wears would not adversely tell upon the specific importance of presence of presence of spermatozoa and human semen on the under-wears of the accused. Deputy Jailor (P.W.5) has not been given the suggestion that the accused while in jail have changed their under-wears after they were sent under judicial custody. The accused also have not stated about any change of their under-wears in their statements under Section 313 of the 'Code'. Therefore in the totality of the circumstances of the case we find it safe to subscribe to the view of the learned Additional Sessions Judge that the under-wears of the accused, which they were wearing at the time of the commission of the offence of rape, were on being attached found stained with human semen and spermatozoa as was also the case with the undergarments of the victim Km. Sushma and this piece of the evidence also indicate that the victim Km. Sushma was subjected to rape by the accused or at any rape any of them when they were together and were accomplice in the commission of the offences. This way the incriminating circumstances referred to above also stand satisfactorily proved by the evidence of the prosecution.

29- According to the prosecution accused Aamir made judicial confession of his guilt before a Judicial Magistrate Sri Mahendra Kumar Joshi (P.W.8). The statement of this accused recorded under Section 164 of the 'Code' is Ext. Ka.7 on the record. Learned Additional Sessions Judge placed reliance on this confession to the extent that it is one of the link in the chain of incriminating circumstances proving the guilt of all the accused of the case. Learned Senior Advocate appearing on behalf of accused Babu and Arjun submitted that the confessional statement of Aamir establish that he alone was responsible for commission of the crimes in relation to the victim of the case and none-else and that the Additional Sessions Judge fell in error in not considering the confession in this perspective. On the other hand learned counsel for the accused Aamir argued that the alleged confessional statement has no evidentiary value as the same was recorded on oath in contravention of the provision of Section 164 of the 'Code'.

Statement, Ext. Ka.7 clearly appear to have been given by the accused Aamir on oath as specifically mentioned in it and therefore it was made in contravention of the provision as laid down in Section 164 read with Section 281 of the 'Code' and therefore no reliance could have been placed on it. Considering this aspect of the matter we are not inclined to accept the argument of learned Senior Advocate that the statement do not indicate that the oath was administered by the Judicial Magistrate to the said accused and therefore the confessional statement having full legal force it impinge full liability of the commission of the crime on its maker, the accused Aamir. We are not impressed by this argument and since the statement was recorded on oath it has to be accepted that the oath was administrated to the accused when the statement was recorded and consequently it lost its evidentiary value. A similar view in regard to the confessional statement on oath under Section 164 of the 'Code' has been taken by the Division Bench of this Court [of which one of us, Hussain, J., was the member] in criminal jail appeal No. 393/2003 decided on 6.5.2005 (Ashok alias Sameer Versus State; 2005 (1) Uttaranchal Decisions, 716). Having considered the relevant aspect of the matter and the evidence in the case we are of the same view and the alleged confessional statement of accused Aamir could not have been reckoned in any manner whatsoever as piece of evidence to establish an incriminating circumstance against the accused of the case. In other words the circumstance mentioned at serial No. 10 above could not have been taken to be a link in the chain of the circumstances in the case.

30- It has been found that the accused was arrested by the witnesses at the spot where the dead body of the victim Km. Sushma was abandoned by them. Neither at the time of the arrest, nor later on when they were examined by the Investigating Officer, nor in the statement under Section 313 of the 'Code' the accused

came out with an explanation as to how the dead body of the victim Km. Sushma came in to their possession. The absence of any explanation therefore create a strong incriminating circumstance

that these accused have all-through been involved in the participation of the commission of the crimes of murders etc of the victim.

31- Merely because no injury on the private parts of the accused was reported as a result of their medical examination it would not mean that it indicate their innocence or that it provide an explanation that they were not arrested at the spot by the witnesses . Here it need to be stated that according to constable Brijpal Sharma (P.W.10) all the four accused were sent from the police station to hospital and were medically examined. Medical examination of only one accused Pawan was brought on record which also does not show any injury on the private part of the accused. Even this aspect and the absence of other medical examination reports as stated above have absolutely no bearing on the facts and evidence adduced in the case by the prosecution and the defence can not be permitted to take any benefit out of it.

32- On consideration of the evidence and the circumstances referred above we are fully satisfied that incriminating circumstances based on which the learned Additional Sessions Judge drew the inference of guilt of the four accused, stand established except incriminating circumstances mentioned at serial Nos. 8 and 10 which however have no adverse bearing or break the chain of the circumstances which otherwise is complete and unerringly prove that Km. Sushma went missing at about 8 A.M. on 25-9-2003 when she want to ease herself from her house; she thereafter did not return alive and could not be searched despite missing report lodged at the police station; that the four accused were seen disposing of her dead body in a gunny bag at 1.30 in the night between 25/26-9-2003 and were arrested at the spot by the witnesses of the case and were taken to the police station and on report being lodged were handed over to the police; that the victim was subjected to rape and carnal intercourse before she was.

Strangulated to death some time after 8 A.M. on 25-9-2003 and the mid night of 25/26-9-2003; that the under-wears of the accused were found stained with human semen and spermatozoa as was also

the case with the undergarments of the victim which were also blood-stained due to ignominy suffered by her; that the accused failed to give any explanation whatsoever as to how they came in to possession of the dead body of Km. Sushma; that the act of the accused disposing of the dead body of the victim indicate their mental bent up of mind that the victim on being picked up by the accused was made to suffer ignominy and that thereafter to prevent girl she was strangulated to death and to screen themselves the accused went to dispose of her dead body in the open plot from where they were arrested red handed on being seen abandoning the dead body of the victim.

33- The accused were held guilty and convicted for the offence punishable under Sections 302/34 I.P.C., 376 I.P.C., 377 I.P.C. and Section 201/34 IP.C. There can be no doubt that the circumstances unerringly point to the guilt of the accused that all of them in pursuance of their common intention committed the murder of the victim after she was made to suffer ignominy at their hands and thereafter they disposed of her dead body in the open plot to cause disappearance of the evidence of the offence with the intention of screening themselves from legal punishment. Therefore the offences punishable under Sections 302/34 and 201/34 I.P.C. were fully established against the accused and they were rightly held guilty and convicted accordingly.

34- According to the medical evidence the ignominy suffered by the girl related to her being ravished besides being subjected to carnal intercourse. Since the accused being four in number and the circumstances conclusively established their guilt the offence of ravishing the victim Km. Sushma fall in the category of gang rape as envisaged under explanation (1) of Sub Section (2) (g) of Section 376 of the Indian Penal Code. Explanation (1) reads as under:-

> Explanation (1) – Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have

committed gang rape within the meaning of this Sub-Section.“

35- As stated above the medical evidence is definite that the victim Km. Sushma had been raped before she was done to death and since the circumstances conclusively prove that she had been raped by one or more in a group of persons acting in furtherance of their common intention each of the four accused had rightly been held guilty of committing the gang rape by the learned Additional Sessions Judge.

36- Despite the medical evidence showing that the victim was also subjected to carnal intercourse there being no deeming clause or explanation as is the case above in regard to the commission of unnatural offence punishable under Section 377 I.P.C. all the four accused in the absence of evidence specifying the individual act in regard to such offence they should not have been held guilty of committing the offence punishable under Section 377 I.P.C.

37- For the reasons aforesaid, we are of the view that the accused were rightly held guilty and convicted for the offences punishable under Sections 307/34 I.P.C.; 376 I.P.C. and 201/34 I.P.C. but they were not liable to be convicted under Section 377 I.P.C. They are therefore to be acquitted for the offence under this count alone.

38- In regard to the sentence awarded, learned counsel for the accused argued that if the crime has been committed out of passion for lust and had not been premeditated and it is not shown that the accused and danger to the society the capital punishment for murder is not warranted. It was also argued that on the facts of the case it was not a rarest of the rare case and therefore the sentence of death awarded to the four accused was not justified. Learned counsel pressed in to service the decision of the Apex Court in the case of Bantu alias Naresh Giri versus State of M.P.; 2002 Supreme Court Cases (Cri.) 777 to support their contention. The facts of the case before the Hon’ble Apex Court were that rape and murder of a six years old girl was committed by the accused who was held guilty and sentenced of death was awarded. The accused was found to have no criminal record and finding that the accused

would not be grave danger to the society at large sentence of death was commuted to that of life imprisonment. Considering the totality of the circumstances of the case and the number of the accused involved who have no criminal record we are of the view that they will not be a grave danger to the society at large and therefore the case at hand can not be termed to be the rarest of the rare case where the four accused required to be eliminated from the society. Hence the sentence of death need to be commuted to Rigorous Imprisonment for life for offence punishable under Section 302/34 I.P.C. The Rigorous Imprisonment for life under Section 376 I.P.C. and sentence of 7 (seven) years R.I. and fine of Rs. 2000/- and in default of payment of fine to further undergo R.I. for six months each under Section 201/34 I.P.C. are liable to be maintained as such. The accused not being found guilty need to be acquitted of the charge under Section 377 I.P.C.

39- In the result these appeals succeed partly. The conviction of accused Pawan, Aamir, Babu and Arjun under Sections 302/34 I.P.C.; 376 I.P.C. and 201/34 I.P.C. are upheld. The sentence of death awarded under Section 302/34 I.P.C. are commuted to that of Rigorous Imprisonment for life. The sentence of Rigorous Imprisonment for life under Section 376 I.P.C. and sentence of 7 (seven) years R.I. and fine of Rs. 2000/- each and in default of payment of fine to further undergo six months R.I. under Section 201/34 I.P.C. against all of them are maintained. The accused are acquitted of the charge under Section 377 I.P.C. and their conviction and sentence under this count are set aside.

40- In view of above the criminal reference No. 6 of 2004 is rejected.

41- All the accused are in jail and they shall be detained in jail to serve out the sentences awarded against them.

42- Let the record be sent back to the court concerned for compliance.

(B.S. Verma, J) **(Irshad Hussain, J)**

ISB